

FEDERAL ELECTION COMMISSION
999 E Street, N W
Washington, D C 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 5963

DATE COMPLAINT FILED 01/17/08

LAST RESPONSE RECEIVED 03/11/08

DATE OF NOTIFICATION 01/30/08

DATE ACTIVATED 04/22/08

EXPIRATION OF SOL 01/2013

COMPLAINANT:

James Braswell

RESPONDENTS:

Club for Growth Political Action Committee and
Pat Toomey, in his official capacity as Treasurer

Andy Harris for Congress and Elizabeth T
Young, in her official capacity as Treasurer

RELEVANT STATUTES:

2 U S C § 434(b)

2 U S C § 441a(a)(2)

2 U S C § 441a(f)

2 U S C § 441d

INTERNAL REPORTS CHECKED:

FEC Database

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves alleged coordination between the Club for Growth Political
Action Committee and Pat Toomey, in his official capacity as Treasurer, ("Club for Growth
PAC") and Andy Harris for Congress and Elizabeth T Young, in her official capacity as
Treasurer, ("Harris Committee") Andrew P Harris' 2008 principal campaign committee for
the U S House of Representatives for Maryland's First Congressional District The

10044264718

1 complaint alleges that Club for Growth PAC coordinated with the Harris Committee in
2 spending \$250,000 on television and radio ads that aired in Maryland's First Congressional
3 District in January 2008. In support of this allegation, the complaint asserts that Club for
4 Growth PAC released the ads "at precisely the same time that Andy Harris littered Maryland
5 mail boxes with a negative attack mailer about his primary opponents" and the ads contained
6 "a virtually identical negative message." The complaint argues that the "choreographed
7 timing and negative content" of the communications "strongly indicate illegal coordination."
8 Consequently, the complaint argues that Club for Growth PAC violated 2 U S C
9 §§ 441a(a)(2) and 441d by making an excessive in-kind contribution to the Harris Committee
10 in the form of the ads and failing to include an appropriate disclaimer, and that the Harris
11 Committee violated 2 U S C §§ 434(b) and 441a(f) by knowingly receiving and failing to
12 report its receipt of the in-kind contribution.

13 In response to the complaint, Club for Growth PAC asserts that the allegation that it
14 coordinated with the Harris Committee in running the ads at issue is baseless, and that it acted
15 independently at all times with respect to the ads. Because the complaint is speculative and
16 sufficiently refuted by specific information in the response, including an affidavit from the
17 Executive Director of Club for Growth, Inc., and in the absence of additional information, we
18 recommend that the Commission find no reason to believe Club for Growth PAC violated
19 2 U S C §§ 441a(a)(2) or 441d, or that the Harris Committee violated 2 U S C §§ 434(b) or
20 441a(f).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

In January 2008, Andrew P Harris was a candidate in the Republican primary for Maryland's First Congressional District E J Pipkin was also a candidate in the Republican primary Both were challengers to nine-term incumbent Wayne T Gilchrest

According to the complaint, on or about January 11, 2008, Mr Harris' campaign distributed direct mail literature attacking Mr Pipkin because he voted for Maryland's annual budget The heading of the mailer stated, "E J Pipkin supported Governor O'Malley's budget" and other text in the mailer stated, "When Republicans said no to Governor O'Malley, Pipkin said yes He's a reliable vote the governor can count on " See Attachment

1
During the week of January 14, 2008, Club for Growth PAC produced \$250,000 in television and radio ads and disseminated the ads across Maryland's First Congressional District A press release issued by Club for Growth PAC states that the television ad "points out that Mr Gilchrest voted with Nancy Pelosi and liberal Democrats more often than any other Republican House member and the E J Pipkin joined the Democrats in voting for Governor Martin O'Malley's massive, big-spending FY 2008 budget " See Attachment 2 Similarly, the press release states that the radio ad "demonstrates that Gilchrest and Pipkin are pretending to be conservatives, but beneath their masks, they are two economic liberals who side with Pelosi and Governor O'Malley " *Id*

The complaint alleges that Club for Growth PAC made the \$250,000 in expenditures for the television and radio ads in coordination with Andy Harris for Congress based on the "choreographed timing" and "virtually identical" negative message of the communications

1 The only other support offered in the complaint is that the Committee's disclosure reports list
2 thousands of donations with the phrase "Earmarked through Club for Growth PAC" "showing
3 that the two organizations have been linked for several months "

4 In response to the complaint, Club for Growth PAC asserts that it acted independently
5 with respect to the ads at issue, and submitted an affidavit of the Executive Director of the
6 PAC's connected organization attesting to its assertion See Affidavit of David Keating
7 ("Keating Aff ") Specifically, Club for Growth PAC states that it had a policy and practice
8 of not coordinating its ads with any candidate, political party, or their agents, and that

- 9 • No person associated with the 2008 Club for Growth PAC ads in Maryland had any
10 conversations with Andy Harris, his campaign, or any of its agents, in which Club
11 for Growth PAC learned about the campaign's plans, projects, activities, or needs or
12 conveyed the possibility that Club for Growth PAC might run independent ads or
13 the particulars of any ads such as the timing or content,
14
- 15 • Club for Growth PAC did not create or disseminate any communications in the 1st
16 District at the suggestion or request of the Harris campaign or of its agents,
17
- 18 • Club for Growth PAC did not seek or receive assent from the Harris campaign or its
19 agents as to any communication in the 1st District,
20
- 21 • Club for Growth PAC did not discuss with, or transfer any information from or to,
22 the Harris campaign or agents regarding any aspect of its communications or its
23 plans, projects, activities, or needs,
24
- 25 • Club for Growth PAC received no information from the campaign or its agents
26 about the timing or content of the Harris mailers referenced in the complaint,
27
- 28 • Club for Growth PAC did not employ any former employee or independent
29 contractor of the Harris campaign,
30
- 31 • Club for Growth PAC did not retain for "purposes of First District communication
32 strategy, production, polling, or media buys any vendor common to the Harris
33 campaign "
- 34

35 Response at pp 5-6, Keating Aff at ¶¶ 6-12 With respect to the alleged similarity between
36 the Club for Growth PAC ads and the Harris campaign mailer, Club for Growth PAC notes

1 that the common content – Harris opponent E J Pipkin's vote for Governor O'Malley's
2 budget – was a matter of public record Response at p 6, Keating Aff at ¶ 13 Club for
3 Growth PAC states that the timing of its ads, in relation to the Harris mailers, was
4 coincidental, and that it ran the ads on its own accord just after the holidays, a few days after
5 the other Republican candidates went on the air, and approximately one month before the
6 primary Response at p 6, Keating Aff at ¶ 14

7 Finally, Club for Growth PAC states that the earmarked contributions show no aspect
8 of coordination, but simply show that members of Club for Growth PAC and its connected
9 organization supported Harris¹ Response at p 6, Keating Aff at ¶ 15

10 **B. Legal Analysis**

11 Under the Federal Election Campaign Act of 1971 as amended ("Act"), no
12 multicandidate political committee, such as Club for Growth PAC, may make a contribution,
13 including an in-kind contribution, to a candidate and his authorized political committee with
14 respect to any election for Federal office, which, in the aggregate, exceeds \$5,000 2 U S C
15 § 441a(a)(2), *see* 2 U S C § 431(8)(A)(i), 11 C F R § 100 52(d)(1) The Act defines in-kind
16 contributions as, *inter alia*, expenditures made by any person "in cooperation, consultation, or
17 concert, with, or at the request or suggestion of, a candidate, his authorized political
18 committees, or their agents " 2 U S C § 441a(a)(7)(B)(i) A communication is coordinated
19 with a candidate, an authorized committee, a political party committee, or agent thereof if it
20 meets a three-part test (1) payment by a third-party, (2) satisfaction of one of four "content"

¹ To date, we have not received a response from the Andy Harris for Congress Committee although Mr Harris won the primary election and the Harris Committee has continued to file required disclosure reports with the Commission

10044264721

standards, and (3) satisfaction of one of six "conduct" standards² See 11 C F R § 109 21

In this matter, the first prong of the coordinated communication test is satisfied because Club for Growth PAC is a third-party payor. The second prong of this test, the content standard, is also satisfied because the ads at issue meet the definition of "electioneering communication" under 11 C F R § 100 29³ See 11 C F R § 109 21(c)(1). The ads also meet the definition of "public communication" under 11 C F R § 100 26, refer to clearly identified candidates for public office (E J Pipkin and Wayne Gilchrest), and appeared within 90 days of the primary election⁴ See 11 C F R § 109 21(c)(4).

While the content prong of the coordinated communications regulations appears to be satisfied in this matter, the conduct prong does not. The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or

² After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C F R § 109 21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C F R § 109 21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. FEC*, 508 F. Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV. A. 06-1247 (CKK)) (granting in part and denying part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. FEC*, ___ F.3d ___, (D.C. Cir. 2008). This decision does not impact this matter, however, because the communication at issue meets other parts of the content standard which the appellate court did not criticize or invalidate.

³ "Electioneering communication" means any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office, is publicly distributed within 30 days before a primary election, and is targeted to the relevant electorate. See 11 C F R § 100 29(a). The Commission's rulemaking implementing *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. ___, 127 S.Ct. 2652 (2007) (*WRTL*), does not affect whether a communication meets the electioneering communication content standard because the Commission did not alter the definition of "electioneering communication." See *WRTL* Explanation and Justification 72 Fed. Reg. 72,899, 72,901 (Dec. 26, 2007).

⁴ "Public communication means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet." 11 C F R § 100 26. The public communication must be directed to voters in the jurisdiction of the clearly identified candidate. 11 C F R § 109 21(c)(4)(iii).

1 distributed at the request or suggestion of a candidate or his campaign, (2) the candidate or his
2 campaign was materially involved in decisions regarding the communication, (3) the
3 communication was created, produced, or distributed after substantial discussions with the
4 campaign or its agents, (4) the parties contracted with or employed a common vendor that
5 used or conveyed material information about the campaign's plans, projects, activities or
6 needs, or used material information gained from past work with the candidate to create,
7 produce, or distribute the communication, (5) the payor employed a former employee or
8 independent contractor of the candidate who used or conveyed material information about the
9 campaign's plans, projects, activities or needs, or used material information gained from past
10 work with the candidate to create, produce, or distribute the communication, or (6) the payor
11 republished campaign material See 11 C F R § 109 21(d)

12 The complaint does not allege facts suggesting that the conduct prong was met in this
13 matter, nor does publicly available information support that conclusion Instead, the
14 complaint asserts that the ads and the Harris Committee's mailer were disseminated around
15 the same time and both referred to E J Pipkin's vote as a Maryland State Senator on the
16 governor's budget in 2007, and that the Harris Committee reported thousands of donations in
17 its disclosure reports with the phrase "Earmarked through Club for Growth " Notably,
18 however, the ads at issue and the Harris Committee's mailer were not identical, as the ads
19 were critical of both of Harris' opponents while the mailer referred only to Pipkin Also, the
20 similar content – Mr Pipkin's vote on the governor's budget – was available on the public
21 record and there is no information suggesting that the Harris Committee asked Club for
22 Growth to air ads that referenced that material See Herb McMullan, *A Time for Change, Why*
23 *I Support Andy Harris*, WASH TIMES (Dec 10, 2007) In addition, earmarked contributions

**MUR 5963 (Club for Growth PAC)
First General Counsel's Report**

1 often merely reflect that members of the PAC and its connected organization support a
2 particular candidate Under these circumstances, the complaint's allegation that the ads at
3 issue were "clearly choreographed" between the Harris Committee and Club for Growth PAC,
4 without additional information, appears to be speculative

5 Moreover, Club for Growth PAC has specifically denied facts that would give rise to a
6 conclusion that the conduct prong is satisfied pursuant to 11 C F R § 109 21(d) Namely,
7 Club for Growth PAC has rebutted any implication that the communication at issue was
8 created at the request or suggestion of, with the material involvement of, or after substantial
9 discussions with, the candidate or his agents See Keating Aff at ¶¶ 6-10, 13 Club for
10 Growth PAC also asserts that it did not employ the services of any former employee or
11 independent contractor of the Harris campaign, had no common vendors with the campaign,
12 and did not receive any information about the content of the Harris mailer or its timing from
13 the campaign or its agents See Keating Aff at ¶¶ 11-12, 14 Given these denials, the
14 speculative nature of the complaint, and the absence of any other information suggesting
15 coordination, the conduct prong of the coordinated communications regulations has not been
16 met, and, thus, there appears to be no resulting violations of the Act ⁵ Therefore, we
17 recommend that the Commission find no reason to believe that Club for Growth Political
18 Action Committee and Pat Toomey, in his official capacity as Treasurer, violated 2 U S C
19 §§ 441a(a)(2) or 441d, and no reason to believe that Andy Harris for Congress and Elizabeth
20 T Young, in her official capacity as Treasurer, violated 2 U S C §§ 434(b) or 441a(f)

⁵ Cf Factual and Legal Analysis for MUR 5879 (Harry Mitchell for Congress) (Commission found reason to believe that an in-kind contribution resulted from republication of campaign material where the campaign committee and party committee advertisements used the same footage)

10044264724

III. RECOMMENDATIONS

1 Find no reason to believe that the Club for Growth Political Action Committee
2 and Pat Toomey, in his official capacity as Treasurer, violated 2 U S C §§ 441a(a)(2) or
3 441d

4 Find no reason to believe that Andy Harris for Congress and Elizabeth T
5 Young, in her official capacity as Treasurer, violated 2 U S C §§ 434(b) or 441a(f)

6 Approve the attached Factual and Legal Analyses

7 Approve the appropriate letters

8 Close the file

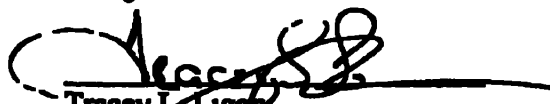
Date

7/8/2008


Thomasena P. Duncan
General Counsel


Ann Marie Terzaken
Associate General Counsel
for Enforcement


Julie K. McConnell
Assistant General Counsel


Tracey L. Ligon
Attorney

Attachments

- 1 Copy of Harris Committee Mailer
- 2 Script of Television and Radio Ads

Pipken Supported O'Malley's Budget Mailer

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

JAN 17 P 2 28

E.J. Pipken supported Governor O'Malley's budget



10044264726



10044264726

E.J. Pipken supported Governor O'Malley's budget



*"The question is not why did I vote
for the [O'Malley budget], but
why did I vote not against it?"*

— E.J. Pipken
November 12, 2007

No wonder *The Gazette* Newspaper called him a "HERO TO DEMOCRATS"

When Republicans said no to Governor
O'Malley E.J. Pipken said yes

Pipken has stood proudly for the values that
Democrats believe in.

In last year's year Pipken voted for Governor
O'Malley's budget—over 100% for budget
and a billion dollar shortfall (source: the
Gazette—2007)

Without the support of people like Pipken
O'Malley could never have passed his spending
proposals.

No wonder Pipken was called a "Hero to Democ-
rats" by the *The Gazette* Newspaper. He is a
reliable vote Governor O'Malley can count on.

When Republicans

said no to Gover-
nor O'Malley,

Pipken said yes

He's a reliable vote
the governor can
count on

Close Window

ATTACHMENT

Page

of

TV: 30 "Four of a Kind"

Who's more liberal? Wayne Gilchrest or E J Pipkin?

In Washington, Gilchrest voted with Nancy Pelosi and liberal Democrats more often than other Republican in the entire Congress

It's a fact

Pipkin joined the liberals and voted for Martin O'Malley's massive, big-spending Budget

Gilchrest or Pipkin?

[Laugh] That's like asking Pelosi or O'Malley

Maryland Republicans deserve better

Club for Growth PAC is responsible for the content of this advertising

Radio: 60 "Masquerade"

The Republican race for Congress in Maryland's First District has become a masquerade ball

Two candidates, Wayne Gilchrest and E J Pipkin, are liberals in disguise

Take off Wayne Gilchrest's mask and you'll find a congressman who voted with Nancy Pelosi more often than any other Republican

And E J Pipkin? He's at the same ball Pipkin joined the liberals and voted for Martin O'Malley's massive, big-spending budget

Pipkin voted to expand eminent domain powers so government could take your private property and give it to someone else

Pipkin even donated money to Kathleen Kennedy's campaign for governor

Fortunately, Maryland Republicans can end this dance

Andy Harris is a conservative who opposed the O'Malley budget and is endorsed

10044264727

by Governor Bob Ehrlich

On February 12th, vote for Andy Harris and send a conservative to Congress

Paid for by Club for Growth PAC Clubforgrowth.org Not authorized by a candidate or candidate's committee Club for Growth PAC is responsible for the content of this advertising

10044264728